v. *Monich,* 74 N. J. L. 522. In Georgia and Massachusetts, however, an entirely different rule prevails, and it has been there held that while the question is primarily one for the court, yet, after the evidence has been admitted, it is not only the right but the duty of the jury to find whether a proper foundation has been laid. *Com.* v. *Brewer,* 164 Mass. 577; *Anderson* v. *State,* 117 Ga. 255; also see note 16, L. R. A. (n. s.) 660. California, Iowa and Oregon seem to have followed this rule also. *People* v. *Thomson,* 145 Cal. 717; *State* v. *Phillips,* 118 Ia. 660; *State of Oregon* v. *Doris,* 94 Pac. 44. Thus the court in the principal case follows the general rule as to this question of admissibility and consequently reverses the prior Iowa decisions following the Massachusetts and Georgia rule. It is to be noted, however, that the court cites no authority to support its decision and makes no reference whatever to the prior Iowa decisions.

EVIDENCE—INSANITY—BURDEN OF PROOF.—On a trial for murder the defense was insanity. A confession of the accused was admitted in evidence over the objection that it was not freely and voluntarily made. *Held,* the burden of proof is on the defendant pleading insanity to prove his legal incapacity to commit the crime and consequently his legal incapacity to confess the crime. *Hinson* v. *State* (Ga., 1922), 109 S. E. 661.

The opinion contains no discussion on principle. All authorities agree that the prosecution can rest upon a presumption of sanity until evidence to the contrary is introduced. There is, however, considerable conflict as to where the burden of proof lies. One view is that insanity is a question of responsibility and while the burden of going forward with the evidence is upon the defendant, the prosecution is, nevertheless, not relieved from proving all the essential elements of the offense, one of which is sanity. *People* v. *Garbutt,* 17 Mich. 9. The rule of the principal case, and what is perhaps the rule in the majority of the jurisdictions, regards insanity as an affirmative defense and the burden of proving it is upon the defendant. See note to *State* v. *Scott,* 36 L. R. A. 721, 726. But it does not follow, as the court would seem to indicate, that because the burden is upon the defendant to prove insanity as a defense it is likewise incumbent upon him to prove a legal incapacity to confess the crime. The general rule is that a confession of guilt is admissible against the accused only when freely and voluntarily made. The ordinary presumption is said to be that it was so made. *Campbell* v. *State,* 63 Tex. Cr. 595; *contra, Godau* v. *State,* 179 Ala. 27. When it appears *prima facie* that the confession was voluntary, the burden of going forward with the evidence upon this issue of voluntariness is upon the defendant. *Sims* v. *State,* 59 Fla. 38. The rule fixing the burden of proof is in dispute. I WIGMORE ON EVIDENCE, § 860. The rule in England and most American jurisdictions is that the burden is upon the prosecution to show the confession to have been voluntary. *The King* v. *Voisin,* [1918] 1 K. B. 531; *Lindsay* v. *State,* 50 L. R. A. (n. s.) 1077, 1081. The rule in Georgia is *contra* and places on the defendant the burden of proving that a confession made by him is not free and voluntary. *Eberhart* v. *State,* 47

Ga. 598. There is a distinction to be noted between insanity as a defense and as going to the free and voluntary character of a confession. It is quite conceivable that the defendant may have been in full possession of his faculties at the time the crime was alleged to have been committed, yet have become insane before making the confession. Had the defendant in the principal case been proved to have been insane at the time the confession was made the question would then have arisen whether the insanity went to the free and voluntary character of the confession so as to render it inadmissible. No case on this bare point appears to have been decided, but it would seem best to dispose of it by analogy to a case of intoxication, treating the extent of the insanity and its effect upon the mind as questions to be submitted to the jury along with the confession, to be considered by them in determining its weight. See note to *Lindsay* v. *State, supra.*

EVIDENCE—NOT ERROR FOR PROSECUTOR TO WITHDRAW WITNESS AND PRIVATELY REFRESH HIS RECOLLECTION.—In a criminal prosecution a witness who had testified before the grand jury manifested a hazy recollection. The prosecutor was permitted to withdraw the witness and refresh her memory as to her previous testimony. No actual prejudice appearing, it was *held* not to be error. *State* v. *Henson* (Mo., 1921), 234 S. W. 832.

It is well settled that previous testimony may be used to refresh a witness's recollection. *State* v. *Martin,* 94 N. J. L. 139; 1 WIGMORE ON EVIDENCE, § 737. The prior testimony, however, should not be read in the presence of the jury. *State* v. *Walters,* 145 La. 209; *Kirkland* v. *State,* 86 Tex. Cr. R. 595; *State* v. *DePriest* (Mo.), 232 S. W. 83. The regular method of refreshing the witness's memory in this way, as is stated in the principal case, is to withdraw the jury. With the privileges which the law gives by way of various methods of stimulating the recollection of a witness while on the witness stand, there would seem to be no reason except a sinister one for withdrawing a witness to refresh recollection. The method adopted in the instant case lends itself too conveniently to the coaching of an unscrupulous witness by an unscrupulous attorney not to be viewed with suspicion. It would not be surprising to find an appellate court presuming prejudice and directing a new trial.

EVIDENCE—OPINION BY AN EXPERT WITNESS ON "THE VERY ISSUE" INADMISSIBLE.—In a dentistry malpractice case the testimony of a family physician, who saw the operation complained of, that it was unskillful, was admitted. *Held,* reversible error as invading the jury's province. *Patterson* v. *Howe* (Ore., 1922), 202 Pac. 225.

While a general rule excluding opinion evidence may have been desirable, it was inevitable that there should result a relaxation necessitated by the practical conditions under which trials are had. It frequently happens in practice that the facts which surround a question are so complicated or so technical that the jury may not be able to grasp them or draw the proper inference. The principle, then, upon which opinion evidence by experts became admissible was assistance to the jury. The limit upon this admissi-